93-850

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

LUIS HIRAM ORTIZ-CAMERON Petitioner

v.

UNITED STATES OF AMERICA Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I

WHETHER THE CONFLICT WITH DIRECT RULINGS OF ITS SISTER CIRCUITS AND WITH PRINCIPLES ANNOUNCED BY THIS COURT, WHICH IS POSED BY THE FIRST CIRCUIT'S APPROVAL OF THE TRIAL COURT'S FAILURE TO ESTABLISH A RECORD REGARDING THE NATURE AND EXTENT OF PREDELIBERATION JUROR DISCUSSIONS REPORTED DURING PETITIONER'S TRIAL, POSES AN INTOLERABLE CONFLICT AND AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW.

II

WHETHER THE FIRST CIRCUIT'S APPROVAL OF A CURATIVE INSTRUCTION WHICH MISDESCRIBED THE GOVERNMENT'S BURDEN OF PROOF PRESENTS AN INTOLERABLE CONFLICT WITH THIS COURT'S DECISION RULING SUCH MISDESCRIPTIONS TO BE ERROR PER SE.

III

WHETHER THE CONFLICT BETWEEN THIS COURT'S ADMISSIBILITY OF IDENTIFICATION ANALYSIS APPLIED IN *MANSON V. BRATHWAITE* AND THE TWO STEP APPROACH APPLIED BY A MAJORITY OF THE CIRCUITS PRESENTS INTOLERABLE CONFLICT, AND FURTHER WHETHER THE FIRST CIRCUIT'S SUMMARY APPROVAL OF THE IDENTIFICATION TESTIMONY ADMITTED IN PETITIONER'S TRIAL CONFLICTS WITH BOTH APPROACHES.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, LUIS HIRAM ORTIZ-CAMERON and 19 co-defendants, of whom the following three were tried together with Petitioner: Pedro Medina Vazquez, Luis E. Ortiz Arrigoitia, and Lazaro Diaz Fernandez. Respondent, United States of America, was the Plaintiff in the proceedings below.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

LUIS HIRAM ORTIZ-CAMERON Petitioner

v.

UNITED STATES OF AMERICA Respondent.

The Petitioner, LUIS HIRAM ORTIZ-CAMERON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in United States v. Ortiz-Arrigoitia, 996 F.2d 436 (1st Cir. 1993).

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals is reported as *United States v. Ortiz-Arrigoitia*, 996 F.2d 436 (1st Cir. 1993) and is reprinted in the Appendix hereto. A-1 to A-60

The decision of the First Circuit denying rehearing is reproduced in the Appendix hereto. A-61

JURISDICTION

On June 3, 1993, the First Circuit Court of Appeals affirmed Petitioner's conviction in the district court. A petition for rehearing was timely filed. The rehearing was denied on August 27, 1993.

The jurisdiction of this court to review the judgment of the First Circuit Court of Appeal is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States states in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime... nor be deprived of life, liberty, or property without due process of law."

The Fifth Amendment to the Constitution of the United States in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury..."

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW:

1. Following a jury trial before the United States District Court for the District of Puerto Rico, Honorable Gilberto Gierbolini presiding, Petitioner ORTIZ-CAMERON was convicted of three counts of narcotics trafficking, which had charged Petitioner *inter alia,* with participation in a single drug importation, on February 27, 1988.

2. The Court sentenced Mr. ORTIZ-CAMERON to 300 months imprisonment plus five years supervisory release.

3. ORTIZ-CAMERON's direct appeal of his conviction to the United States Court of Appeals for the First Circuit was denied on June 11, 1993.

4. ORTIZ-CAMERON's petition for rehearing and suggestion of rehearing en banc was also denied, on August 27, 1993.

STATEMENT OF FACTS

The connection between Petitioner and the importation of narcotics into Puerto Rico in the wee hours of February 27, 1988, derived from the government's co-operating witness, Geraldo Portalatin's identification of defendant. According to Portalatin, he recognized Petitioner as the person who drove the contraband and various conspirators from a makeshift landing strip to a house where the drugs were transferred to a larger truck parked in the house's rear. R-354-355[1] Portalatin's testimony placed him in the

[1]In this brief, all citations are to the Record Appendix of Appellant submitted with Initial Brief to the First Circuit.

driver's company for more than a few minutes, but under circumstances which were not conducive to accurate observation of the driver: Portalatin had just crashed landed; the plane bearing the contraband was on fire; Portalatin had bumped his head, and was in "shock"; R349-351 in the dark of night Portalatin and others rode with the driver, to a house where all busied themselves with the transfer of the drugs to a larger truck; as soon as the transfer was completed, Portalatin left. R44-45 Portalatin was never introduced to the driver (though he did learn that his name was "Hiram"); Portalatin apparently never saw this individual face to face.

Portalatin was first asked to identify this driver over a year later,

after Portalatin had turned State's evidence. In the midst of debriefing, when he mentioned the driver Hiram, Portalatin was presented by the prosecutor, with a single photo of Petitioner, which Portalatin identified as the driver.[2] R54-55 No reason or justification was offered by the government for its use of the highly suggestive single-photo procedure, nor for the government's failure to procure Portalatin's prior independent description of the driver. Furthermore, due to the government's failure to disclose this suggestive identification procedure in response to Petitioner's discovery

[2]This photo was subsequently shown to Portalatin several more times prior to trial.

requests, Petitioner learned of it for the very first time mid-trial. Petitioner's subsequent motion to exclude the identification, or in the alternative explore the details if the out-of-court identification procedures in an in-*camera* heraing, was denied by the court. R197

Just after the close of the government's case, it was revealed to the court that a daughter of a juror, who had regularly been accompanying her mother to court, had been observed in extended conversation with a young woman identified as the girlfriend of the Defendant, ORTIZ-CAMERON. The court immediately proceeded to question the daughter, Ms. Zayas. R. 99-112. Ms. Zayas admitted having been discussing the case with another young woman, and stated that this had been the

first such contact between them, and that the woman had not asked the daughter to mention the conversation to her mother, Juror Gonzalez. The Court then began to explore the area of Ms. Zayas' conversation with her mother, and Ms. Zayas made the surprising revelation that she and her mother discussed the case on a daily basis:

> The Court: Have you talked with your mother about this?
>
> Ms. Zayas: Yes, everyday we speak about the case.
>
> The Court: You talked about the case with your mother?
>
> Ms. Zayas: Yes.

R.104.

As the Court questioned further, Ms. Zayas disclosed that in conversing with

her mother, Ms. Zayas had communicated her own impression of guilt, specifically regarding the Defendant, ORTIZ-CAMERON:

> The Court: Has she expressed an opinion about the guilt or innocence of the defendants?
>
> Ms. Zayas: Well, she says that she still doesn't know and I tell her that well, there are some defendants that they mention a lot like Lazarito and Hiram Cameron. ...
>
> Ms. Zayas: I say that to her and she answers back to me, yes, it is true that I am right, that they had involved Lazarito and Cameron several times.

R.104-105.

Ms. Zayas stated that as far as she knew, Juror Gonzalez had never quoted Ms. Zayas' comments to the other jurors.

However, Ms. Zayas' testimony was unequivocal on the point that Juror Gonzalez and the other jurors had been discussing the case together. The similarity between the mother/daughter comments and the jurors' discussions was clear:

> The Court: Has she [Juror Gonzalez] said that she has talked with the other jurors as to anything? Of course, they have to talk something.
>
> Mr. Nogueras [co-defendant's counsel]: May I suggest, Your Honor:
>
> The Court: What is the question that you want me to pose to her?
>
> Mr. Nogueras: In a general way, her mother has mentioned that between her, the mother and the other jurors they have

spoken about the case in a general way.

Ms. Zayas: Yes.

The Court: In relation to what?

Ms. Zayas: What the witness is saying, they talk about the same thing.

The Court: - What do you mean about "lo mismo"? What do you mean by "lo mismo"?

Ms. Zayas: According to what she said to me, well, they do make comments about what the witness has said but something like that specific regarding innocence or guilt, no.

Mr. Nogueras: Your Honor, may I suggest about the many times that Lazarito and Hiram have been mentioned by the witnesses, has she talked about that?

The Court: Translate.

Ms. Zayas: Yes.

The Court: About what?

Ms. Zayas: Well, I am going to use some words, saying that they were not very good; that their reputation was not very good.

The Court: Who said that?

Ms. Zayas: Well, members of the jury, what they have spoken in the room, their comments.

R.1067-108. Emphasis added.

Immediately following the interview of Ms. Zayas, the Court questioned Juror Gonzalez. The Juror was extremely nervous. The Court several times asked her to calm down. R. 113, 114-116. Juror Gonzalez herself referred to the "scare"

she was being subjected to R. 117, and its effects on her blood pressure R. 113. Mrs. Gonzalez was equivocal R. 115 and non-responsive R. 118 in dealing with the Court's questions, and in general, denied the contents of her daughter's statements. Following Mrs. Gonzalez interview, defense counsel noted the "completely contradictory" nature of the two women's testimony, and, observed that of the two, it was the mother who had clearly been motivated to withhold information. R. 123. The Court indirectly commented on Mrs. Gonzalez's lack of candor, by acknowledging that Mrs. Gonzalez's desire to protect her daughter had influenced the juror's responses: "she was very worried because she thought that something had been done by her daughter, so that is her

attitude." R. 125. The Court announced its decision to dismiss Juror Gonzalez.

On the following morning, the Court polled all the jurors. The Court spent approximately forty-five seconds R. 152 having each juror individually, respond to the following four questions:

> 1. At this point have you discussed with the other jurors or with anyone else the guilt or innocence of the defendants?
>
> 2. Have you discussed with the other jurors or with anyone the reputation of the defendants?
>
> 3. Have you discussed with the other jurors or with anyone else the credibility of any of the witnesses?
>
> 4. At this point, have you reached a decision regarding

> the guilt or innocence of the defendants?

R. 136-149A.

All the jurors except one answered the first three questions in the negative. During the questioning of Juror Luis Carrero Roman, the following exchange occurred:

> The Court: "Have you discussed with the other jurors or with anyone else the credibility of the defendants -- witnesses?"
>
> Juror: I think we made comments but ...
>
> The Court: Have you discussed the credibility of the witnesses already?
>
> Juror: The credibility?
>
> The Court: Yes, of the witnesses.

> Juror: Well, I can say it is hard for me to say yes or no <u>because yes, we made comments between us</u> but nothing that I can say yes or not.
>
> The Court: Okay.

R. 137, emphasis added.

When Juror Roman had exited, the Court cut off defense counsel and stated "I am not going to enter into the comments they made. I am not going to enter in to that if that is what you are going to say." R.138.

In response to the Court's fourth question, four jurors answered affirmatively, indicating that they had already reached a decision regarding the guilt or innocence of the defendants. R.

142, 145, 146, 147.[3] Each of these four jurors was individually recalled for a second audience with the Court. In his introductory comments to this second questioning, the Court initially admonished the four (4) jurors:

> As I instructed you before, the guilt or innocence of the defendants is decided after listening to all the evidence, to the final summations of the attorneys and after applying the instructions as to the law to be given be me.

R. 149A-151.

Following this instruction, the Court presented to each juror the following

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[3]Although the Court never asked the jurors to articulate the nature of their decision, it is beyond cavil that their decision, based solely upon the prosecution evidence, would have been one of guilt.

leading question:

> And my question is, would you be able to keep an open mind and in the course of your deliberations with your fellow jurors, re-examine your own views and change your opinion of convinced it is erroneous?

All four jurors responded in the affirmative. R. 149A, 150, 151. Juror Roman, who admitted having engaged in discussions with other jurors, was not recalled.

Throughout the inquiry, the Court refused to allow defense counsel to propose follow up questions, or even to speak at all.

After the last juror had been excused, however, the Court polled all counsel as to their positions. All defense counsel moved for mistrial.

Counsel for ORTIZ-CAMERON argued that the presumption of innocence had been compromised. The government opposed the mistrial motions, and requested that the court make findings, on the record, as to the sincere demeanor of the jurors.

In stating its reasons for denying mistrial, the Court cited the "sincerity ... and the expressions in the face of each juror."

Upon reconvening, the jury was instructed as follows:

> So, I again repeat my instructions to you, not to form or express an opinion regarding the guilt or innocence of the defendant, to keep an open mind. Don't discuss the case among yourselves or with anyone else. Keep an open mind.

Although, the Court also gave several

other "reasonable doubt" instructions in connection with various aspects of the case, at no time did the Court unequivocally instruct that the burden of proof was always on the government.

REASONS FOR GRANTING THE WRIT

ISSUE I

THE CONFLICT WITH DIRECT RULINGS OF ITS SISTER CIRCUITS AND WITH PRINCIPLES ANNOUNCED BY THIS COURT, WHICH IS POSED BY THE FIRST CIRCUIT'S APPROVAL OF THE TRIAL COURT'S FAILURE TO ESTABLISH A RECORD REGARDING THE NATURE AND EXTENT OF PREDELIBERATION JUROR DISCUSSIONS REPORTED DURING PETITIONER'S TRIAL, POSES AN INTOLERABLE CONFLICT AND AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW.

A. This Court, in the past has addressed the issue of a trial court's responsibility in dealing with allegations of potential juror prejudice. The consistent requirement repeated by the Court's opinions is that the trial court shall fully and fairly determine the circumstances and impact of a potentially prejudicial event. "The trial court...

should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *United States of America* v. *Remmer*, 347 US 227, 229-230, 74 S.Ct. 450, 98 L.Ed. 654 (1954). Similarly, this Court has held that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer*." *Smith v. Phillips*, 55 US 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).[4]

[4] Virtually every circuit has recognized that the primary obligation upon the trial court, when an allegation

Remmer and *Phillips* and other related

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of juror misconduct surfaces, is to determine with precision whether or not the alleged misconduct occurred, and, if so, whether it was prejudicial. See *e.g.*, *US v. Chang En Low*, 851 F.2d 547 (2d Cir. 1988)(trial judge should first determine whether media trial coverage has potential for unfair prejudice, jurors should then be canvassed, if it is ascertained that any juror has been exposed to such publicity, he should be examined individually, to determine extent of exposure and its effect on jury's attitude toward trial, trial judge can then determine whether any further steps are necessary to insure a fair trial); *Government of Virgin Islands v. Dowling*, 814 F.2d 134 (3d Cir. 1987)(new trial granted because trial judge failed to develop a record sufficient to permit evaluation of the potential prejudice to the defendant and failed to make a finding regarding the juror's impartiality which took into account whatever information they had received); *United States v. Navarro-Garcia*, 926 F.2d 818 (9th Cir. 1990) (Evidentiary hearing must be granted unless the alleged misconduct could not have affected the verdict or the district court can determine from the record before it that the allegations are without credibility.)

opinions of this Court, (*e.g., Rosales-Lopez v. United States*, 407 US 182, 101 S.Ct. 1629, 68 L.Ed.2d 22 (1981)) dealt with incidents of external influence upon jurors. However, an unsettled yet important Federal question exists as to what standards apply to intra-jury misconduct reported mid-trial.[5] In a recent opinion which deals comprehensively with this issue, the Third Circuit ruled that where the nature and extent of premature juror communications were not

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[5]. Due to the difficulty of reconstructing trial occurrences after a jury has already been discharged, and further in light of the prohibitions placed by Rule 606(b) of the Federal Rules of Evidence upon juror testimony regarding intra-jury influences after verdict has already been rendered, the issue of proper post-trial standard of inquiry poses a separate issue, and one not raised by the case *sub judice*.

otherwise exposed on the record, the trial court's refusal of the defendant's motion to inquire meaningfully into the misconduct, justified the granting of a new trial. *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993). The ruling of the First Circuit in the case *sub judice* is in direct conflict with the Third Circuit's ruling in *Resko*, as well as with the broad based intercircuit authorities cited by the Third Circuit in support thereof.[6] In

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[6]. Significantly, the *Resko* opinion cited, as comporting with its ruling, "the approach of the First Circuit, which has specified that when jury misconduct (including improper intra-jury influences) has been alleged, the district court should: ascertain whether the misconduct actually occurred; if it did, determine whether it was prejudicial; and if there are no grounds for a new trial, specify the reasons it decided that misconduct did not occur, or occurred but was non-prejudicial. See *United States v. Richman*, 600 F.2d 286, 295 (1st Cir. 1979)." F.3d at 691. This neutral

view of the fundamental importance of the Sixth Amendment guaranty of a verdict by an impartial jury, the conflict posed by the First Circuit's opinion in the case *sub judice* is intolerable, and merits resolution by this Court.

B. Juror Roman's admission that he and other members of the jury had engaged in discussions, did not occur on a clean slate. Rather, the very inquiry to which Roman's statement responded was necessitated by the earlier revelations of impropriety by juror Gonzalez and her daughter, Miss Zayas. Miss Zayas (noted

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observation of the Third Circuit underscores and supports Justice Stahl's dissent to the effect that the First Circuit's opinion *sub judice* is in direct conflict with its own earlier pronouncement in *Richman*. See Appendix at A-59-61, n.9.

by the record as the more forthcoming of the two women) revealed that the jurors had discussed Petitioner ORTIZ CAMERON by name in comments which implied the likelihood of his being guilty as charged.[7] According to Miss Zayas, these comments had been made in the course of the jurors' discussion of witness testimony. Since Roman's revelation also came in answer to the court's question regarding the witnesses, Roman's statement was directly linked to and corroborated the Zayas disclosure.

The events below showed that at least

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[7]. This is a classic example of just the type of discussion which the rule prohibiting jurors from engaging in predeliberation discussions of a case was fashioned to prevent. See discussion of General Principles of Premature Jury Deliberations, *Resko* at 688-690.

one juror had regularly discussed the evidence with her daughter, and that four (4) other jurors had prematurely decided the issue of guilt. Thus, the court below was not afforded the luxury of simply presuming that the jurors had complied with his instructions but rather, needed to establish the lack of prejudice to defendants flowing from the "comments" Roman had revealed.

The significance of Roman's statement was enhanced by the fact that the definite and unequivocal portion of that statement referred to the fact that "Yes, we made comments amongst ourselves." The only aspect of his answer regarding which Roman seemed unsure, was whether or not those comments qualified as dealing with

"credibility."[8] Given the sureness of Roman's statement that discussions had taken place, especially against the background of Zayas' testimony, the First Circuit's suggestion that the "extremely indefinite," A-34, n.2, nature of Roman's answer justified the lower court's failure to investigate further, seems both inapt and ironic; the "indefinite" nature of Roman's report cannot justify the trial court's failure to inquire further, when it was this failure itself rather than an established lack of more definite information which artificially truncated the record.

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[8]. The credibility of witnesses is a somewhat technical term, especially for a lay person such as juror Roman whose mother tongue, it appears elsewhere on the record, was Spanish and not English.

The court's response to Roman evinced an effort to stamp out or avoid a report of the nature and extent of juror discussions, while, *according to Resko*, the court's obligation actually was to have created a record in this regard. The *Resko* court's reasons for granting a new trial are equally applicable to the lower court's refusal to further investigate the misconduct reported by Juror Roman: "The very crux of the problem here is that neither we nor the district court know anything about the nature of the jurors' discussions. Similarly, there is no way to know the extent of the discussions - whether they had been occurring throughout the trial, or whether they were only a few, brief conversations. This lack of information concerns us for two reasons.

First, as we have noted, the district court's ability to evaluate the situation was necessarily diminished by the dearth of information about the jury's misconduct. Even taking into consideration the discretion enjoyed by the district court as well as the court's general observance of the jury, we do not see how the district court could have had enough information to make a reasoned determination that the defendants would suffer no prejudice due to the jury misconduct or to fashion an appropriate cautionary instruction.[9] Second, our own

[9] This language in *Resko* recognizes that the ultimate result of misconduct inquiry is the assessment of whether and how the jurors may be curatively instructed. Unfortunately, as more fully addressed below, Petitioner was also denied constitutionally effective curative instructions.

ability to review the district court's determination that there was no prejudice to the defendants is hampered by this absence of information in the record." F.3d at 691, emphasis added.

The occurrence of multiple layers of misconduct in Petitioner's trial might explain the trial court's interest in dealing with at least one of these episodes in a summary fashion, but cannot excuse same. Nor can it excuse the First Circuit's nonchalant conclusion that the trial court's initial questioning of the jurors served to sufficiently expose the nature and extent of the predeliberation discussions reported by juror Roman.[10]

[10] As Judge Stahl noted, the court's initial inquiry of the other jurors "could not possibly have revealed anything about what juror [Roman] did or did not know about the putative juror

Because the trial court failed to expose the nature and extent of reported predeliberation discussions, "we have less reason to trust the district court's judgment that the defendants were not prejudiced" thereby. *Resko* at 692. Unless and until it is known exactly what comments were made, who made them or who heard them,[11] any conclusion about lack of

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misconduct." A-60-61, n.9. Furthermore, the First Circuit's assertion that defendant/Petitioner did not "specifically argue" on appeal the issue of the trial court's failure to further investigate on record juror Roman's statement regarding predeliberation discussions is belied by the record; Petitioner's initial appellate brief described the facts underlying this issue at length (pages 8 through 13), and devoted a significant portion of the argument section to the issue of "Predeliberation discussions amongst jurors", (pages 15 through 19).

[11] Significantly, the trial court never asked the jurors below whether they had <u>heard</u> other jurors commenting, rather

prejudice flowing to Petitioner therefrom is mere speculation.

It is respectfully suggested that in order to foster uniformity amongst the sister circuits (as well as uniformity within the precedent of the First Circuit itself as established by *Richman* and its faithful progeny), this Honorable Court should render an opinion regarding the obligation of a trial court to investigate on the record intra- as well as extra-jury discussions and extend to Petitioner the same relief as afforded appellant Resko by the Third Circuit, to wit, declaration of a mistrial and remand for proceedings consistent therewith.

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only whether they themselves had engaged in discussions.

ISSUE II

THE FIRST CIRCUIT'S APPROVAL OF A CURATIVE INSTRUCTION WHICH MISDESCRIBED THE GOVERNMENT'S BURDEN OF PROOF PRESENTS AN INTOLERABLE CONFLICT WITH THIS COURT'S DECISION RULING SUCH MISDESCRIPTION AS BEING ERROR PER SE.

In its recent decision of *Sullivan v. Louisiana*, ____ U.S.____ 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), this court emphasized the fundamental importance of correctly describing to jurors the government's burden of proof in a criminal trial. Due to the basic protection afforded by our justice system's requirement that the government prove guilt beyond a reasonable doubt, this Court ruled, it is constitutionally crucial that the government's burden be correctly described to the jury. Accordingly, the holding in *Sullivan*

established that a court's misdescription of the government's burden of proof is error per se, that is, constitutional error not subject to harmless error analysis. *Sullivan, supra*, relying among other authorities upon *In re Winship*, 397 U.S. 358 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) ("we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged") and *Arizona v. Fulminante*, 499 US 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (where the Court recognized that type of error which involves "instructural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error'

standards.")

In the case sub judice, the First Circuit affirmed Petitioner's conviction, even though that conviction resulted after the trial court had seriously misdescribed the government's burden of proof to four members of the jury. The trial court attempted to cure four jurors' premature decision of guilt by directing those jurors to be willing to change their premature decision, if the jurors were to be "convinced it is erroneous." With this remark, the court impermissibly lightened the government's burden of proof. The court's impermissible misdescription entailed two elements: first, the court's statement shifted the government's burden of proof onto the defense, by establishing an expectation that the balance of the

proceedings, i.e., the defense case, bore the burden of undoing, or convincing the jurors that their initial decision of guilt was erroneous. Secondly, and more crucially, the court's comment equated a verdict of acquittal with a conclusion by the jurors that guilt was erroneous, rather than with the conclusion that guilt was subject to reasonable doubt. As such, the court's comment "affect[ed] the framework within which the trial proceed[ed]." *Sullivan*, Chief Justice Rhenguist, concurring, 113 S.Ct. at 2083.

The First Circuit suggested that the trial court's closing charge to the jury at large was effective to cancel any impropriety resulting from the court's mid-trial remarks to the four jurors. As authority for this conclusion, the First

Circuit cited the principle announced by this Court that "a single instruction to a jury may not be judged in artificial isolation". A-37. This principle was originally applied by this Court in cases where a challenged instruction had itself been given in the context of the closing charge to the jury. *Cupp v. Naughten*, 14 U.S. 141, 147, 94 S.Ct. 396, 38 L.Ed.2d 368, 373 (1973); *Boyd v. United States*, 217 U.S. 104, 107, 46 S.Ct. 442, 70 L.Ed. 856 (1926).

This Court's warning against "artificial isolation" of a jury instruction, implies as its logical counterpart a prohibition against artificial contextualization of an instruction that was, in fact, isolated in time and context from the closing jury

charge. At Petitioner's trial the court's mid-trial remark, and not the court's closing charge, provided the four jurors last impression regarding their premature decision, for this remark was the only time the court directly addressed that decision. Any other instructions could not be assumed to have been applied back in time by the jury to defeat the original direction given by the court, i.e., that the jurors needed to be "convinced [their opinion was] erroneous" before they could acquit.

Moreover, the First Circuit's willingness to rely on the closing charge as curative of the mid-trial admission of premature decision, begs the question of why <u>any</u> mid-trial colloquy was necessary. Certainly, the trial court presumed that

an immediate addressing of the misconduct was necessary and the First Circuit nowhere stated that the trial court would have been free to ignore the jurors statement until closing charge. However, it is certainly inconsistent to recognize the need for curative instruction, and then to accept a remark fraught with misstatements of basic constitutional principles as having accomplished that cure.

The First Circuit characterized the subject comment by the trial court as an "open mind" instruction. However, the First Circuit did not address the fact that what the court directed the jurors to keep their minds open for, was a level of proof less than that required of the government by the due process requirement

of proof beyond a reasonable doubt. Thus, the First Circuit's affirmance of Appellant's conviction conflicts with the principle recognized by this court that "where the jury views the evidence from the lens of a defective reasonable doubt instruction, ... there can be no factual findings made by the jury beyond a reasonable doubt." *Sullivan*, Chief Justice Rhenquist, concurring, 113 S.Ct. at 2083. In the interest of uniformity, the First Circuits's ruling should be reversed, and petitioner just as petitioner *Sullivan* was, should be afforded a new and constitutionally fair trial.

ISSUE III

THE CONFLICT BETWEEN THIS COURT'S ADMISSIBILITY OF IDENTIFICATION ANALYSIS APPLIED IN *MANSON V. BRATHWAITE* AND THE TWO STEP APPROACH APPLIED BY A MAJORITY OF THE CIRCUITS PRESENTS INTOLERABLE CONFLICT, AND FURTHER THE FIRST CIRCUIT'S SUMMARY APPROVAL OF THE IDENTIFICATION TESTIMONY ADMITTED IN PETITIONER'S TRIAL CONFLICTS WITH BOTH APPROACHES.

A. In *Manson v. Brathwaite,* 423 US 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), this Court ruled that "reliability is the linchpin in determining the admissibility of identification testimony." To analyze reliability, the court suggested, and followed, the following procedure:

First the Court considered the five factors set out in Neil v. Biggers, 409 US

188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972),[12] and against these factors the Court then weighed the corrupting effect of the suggestive identification itself.

The majority of the federal circuits, including the First Circuit (*United States v. Bouthout*, 878 F.2d 1506, 1514 (1st Cir. 1990)) have adopted a "two-part test" which reverses the order of the analysis applied by this court in *Brathwaite*. First, the Circuits determine whether the identification procedure followed was unnecessarily suggestive. Only if the procedure is found to be unnecessarily

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[12]These factors include 1) the opportunity of the witness to view the criminal at the time of the crime, 2) the witness's degree of attention, 3) the accuracy of his prior desription of the criminal, 4) level of certainty demonstrated at the confrontation, and 5) the time between the crime and the confrontation.

suggestive, does the court continue with consideration of the five *Biggers* factors. As authority for their two-part test, the Circuits cite to both *Biggers* and this Court's opinion in *Simmons v. United States*, 390 US 377, 88 S.Ct. at 967, 19 L.Ed.2d 1247 (1968). None of the Circuits acknowledged the fact that this court's opinon which followed both *Biggers* and *Simmons*, derived and applied a reliability analysis in the opposite order from that required by the Circuits. In addition to reversing the order under which this court proceeded in *Brathwaite*, the Cirtcuit Courts' two-part test sets up the determination of impermissible suggestiveness as a prerequesite to consideration of the totality of the circumstances. This Court's approach in

Brathwaite was a more fluid approach, in which the suggestiveness of the identification procedures is not considered initially and in isolation, but rather is weighed and considered as against the totality of the circumstances. The more fluid approach followed by this court in Brathwaite potentially allows for a lower threshhold of unreliability than does the two-part test applied by the Circuit Courts. This raises the important federal question of which is the proper order of procedure in analyzing questions of admissibility of identification testimony, which merits resolution by this Court.

B. Even if the Circuit Courts' two-pronged test is ruled to be acceptable under *Brathwaite*, that test was

incorrectly applied by the First Circuit in the case *sub judice*. Unlike its Sister Circuits,[13] the First Circuit's opinion in Petitioner's case, offered virtually no analysis of, or adequate reason for accepting the suggestible single-photo identification procedure employed. A-9-A-12 There is no basis for concluding that the First Circuit even focused on let alone weighed, details of this procedure.

[13]Example of Circuit Courts' careful application of the two-pronged test occur, e.g., in *Cikra v. Drugger*, 840 F.2d 893, 896-897 (11th Cir. 1988) (citing specific, detailed reasons why photo array "not impermissibly suggestive."); Kubat v. Thieret, 867 F.2d 351, 357-359, (7th Cir. 1989) (Detailed support for lack of suggestiveness in i.d., procedure shored up with details regarding reliability to i.d., testimony under five factors to totality of circumstances test); *United States v. Shaw*, 894 F.2d 689 692-693 (5th Cir. 1990) (Court addressed each factor argued by defendant as contributing to alleged impermissible suggestively of i.d., procedures).

For example, the First Circuit's opinion failed to address the suggestiveness inherent in the prosecutor having shown Portalatin the single photo of Petitioner just after the witness described the role of an individual named "Hiram".

Similarly, of the five factors so carefully analyzed by this Court in *Brathwaite*, the First Circuit rested its analysis of the reliability of Portalatin's identification on only one aspect of one *Brathwaite* factor, i.e., the length of time element of the witness's opportunity to view the accused. ("It would appear that Portalatin had spent over two hours in the close company of "Hiram".) A-12

The First Circuit's failure to either 1) articulate and state reasons for, its

implied conclusion that the government's identification procedures were not suggestive or, 2) to fully analyze the five factors contributing to reliability under the totality of circumstances, presents a conflict with suggestive identification procedure heretofore accepted by the First Circuit and its Sister Circuits alike. This lapse in accepted analysis not only enabled the First Circuit to rubber-stamp the trial court's summary admission of the challenged identification, but also presents a conflict among the Circuits which, it is respectfully suggested, in the interest of uniformity of federal law, should be addressed by this court.

CONCLUSION

Inasmuch as the decision of the First Circuit conflicts in principle if not directly with the Due Process and Impartial Jury Clauses of the Fifth and Sixth Amendments, as well as with opinions interpreting those Clauses issued by this Court and several United States Circuit Courts of Appeal, the First Circuit's opinion represents a departure from principles integral to our Constitutional justice system, produces conflict and disunity in the body of Federal law, and therefore, merits review by this Court.

Respectfully submitted

SAMUEL I. BURSTYN
Counsel of Record

November, 1993

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 91-1290

UNITED STATES,
Appellee,

v.

LUIS E. ORTIZ-ARRIGOITIA, a/k/a COLIBRI,
Defendant, Appellant.

No. 91-1365

UNITED STATE,
Appellee,

v.

LUIS HIRAM ORTIZ-CAMERON,
Defendant, Appellant.

No. 91-1366

UNITED STATES,
Appellee,

v.

PEDRO MEDINA-VAZQUEZ, a/k/a PURUCO,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT
FOR THE CISTRICT COURT OF PUERTO RICO

[Hon. Gilberto Gierbolini, U.S. District Judge]

Before

Selya and Stahl, Circuit Judges,
and, Skinner, *District Judge.

Samuel I. Burstyn argued for appellants Ortiz-Cameron and Medina Vazquez and was on brief for appellant Ortiz-Cameron.

Jose R. Franco Rivera argued for appellant Ortiz-Arrigoitia and was on joint brief for appellants Ortiz-Arrigoitia and Medina-Vazquez.

Luis Rafael Rivera on joint brief for appellants Medina-Vazquez and Ortiz-Arrigoitia.

Joseph S. Uberman, Attorney, Criminal Division, U.S. Department of Justice, with whom Robert S. Mueller, III, Assistant Attorney General, Mary Lee Warren, Chief, Criminal Division, U.S. Department of Justice, Hope P. McGowan, Attorney, Criminal Division, U.S. Department of Justice, and Daniel F. Lopez Romo, United States Attorney, were on brief for appellee.

June 11, 1993

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* Of the District of Massachusetts, sitting by designation.

SKINNER, *District Judge*. These appeals are from convictions on assorted charges of conspiracy, importing and possessing large quantities of marijuana and cocaine, aiding and abetting therein and, in the case of Medina Vazquez, possession of a firearm in connection with the drug charges. These defendants were tried together with two others. This trial was part of the serial prosecution of some 55 members of a large scale drug importation and distribution organization known as "La Nena." Of their numerous assertions of error, the most serious is the denial of their motions for a mistrial after discovery by the court that four of the jurors had arrived at a conclusion concerning guilt prior to the presentation

of the defendants' evidence. We reserve our discussion of this difficult issue until last.

1. Sufficiency of evidence.

All defendants challenge the sufficiency of the evidence against them because the government's case depended on the testimony of Geraldo Portalatin Toledo ("Portalatin"), a leading member of the "La Nena" drug organization. Defendants argue that Portalatin's testimony was so unreliable and so sketchy as to them, that it was insufficient as a matter of law. Portalatin was cross-examined concerning his deals with the government. The judge gave complete and correct instructions detailing the special care the jury should take in assessing the testimony of an

accomplice. Under these circumstances, an accomplice is a qualified witness and the credibility of the witness is for the jury. *United States v. Restrepo-Contreras*, 942 F.2d 96, 99 (1st Cir. 1991)(it is the province of the jury to assess the credibility of a witness), *cert.denied*, 112 S.Ct. 955 (1992). Portalatin testified that Ortiz-Arrigoitia and Medina Vazquez helped unload various shipments of marijuana and cocaine and Ortiz-Cameron participated in the unloading and distribution of a load of cocaine at a "clandestine airfield" at La Furnia Farm in Barceloneta, Puerto Rico. Portalatin's evidence, if believed, when considered with the other evidence in the case was sufficient to support conviction

by the jury, notwithstanding Portalatin's unsavory history and the contrary evidence presented by the defendants.

2. Improper admission of testimony.

Ortiz-Cameron further asserts error in the admission of evidence. Portalatin testified that the driver of a Chevrolet "power wagon" (apparently a four-wheel-drive truck) which was used to remove the cargo of cocaine after and incoming plane crashed at Furina was "Hiram," whom he identified as Luis Hiram Ortiz-Cameron, the defendant. Portalatin had been in the plane which crashed, had bumped his head, had pulled the pilot out of the plane and had described himself as "shaken" by the experience. Ortiz-Cameron argues that Portalatin's condition made

him so unreliable that his testimony should not have been allowed. There is no evidence, however, that he was in any way incapacitated. He pulled the pilot from the plane and helped salvage the cargo. He then spent two hours beside "Hiram" as the latter drove the "power wagon" to the destination of the contraband. Under such circumstances, his credibility was for the jury.

During the cross-examination of Portalatin, the defense attorney discovered for the first time that Portalatin, during his debriefing by government agents, was shown a picture of Ortiz-Cameron. He immediately identified the picture, saying "That's Hiram." It does not appear that any suggestive

comment was made. This picture was not part of a spread, however, and it was shown to Portalatin in the course of the discussion of his participation in the various drug transactions.

Defense counsel moved that Portalatin's testimony concerning Ortiz-Cameron be stricken as unacceptably tainted. Among other reasons, he asserted that he had not been shown the photograph in question, and that the evidence packet furnished by the prosecution contained copies of photographs which were simply blotches of white on black. The prosecutor replied that all defendants had been invited to the office of the United States Attorney to view all of the government's hundred of exhibits, but that

none of them had taken advantage of the opportunity. The trial judge made no explicit finding, but apparently accepted the prosecution's explanation. He offered to suspend the trial, however, to provide defense counsel an opportunity to examine the photo and to develop any evidence of improper suggestion. Counsel declined and proceeded with the cross-examination of Portalatin. Not until eight days later, at the close of all the evidence, did counsel move for a *voir dire* of Portalatin to explore any possible taint. This untimely motion was denied.

The reliability of identification testimony allegedly tainted by reason of an impermissibly suggestive photograph should be resolved after consideration of

all the circumstances *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977); *United States v. Bouthot*, 878 F.2d 1506, 1514 (1st Cir. 1989). In this case, it would appear that Portalatin had spent over two hours in the close company of "Hiram," albeit at night and under difficult circumstances. He knew Hiram's first name before the photograph was identified.

The district judge's offer to suspend the trial to permit further investigation was refused. The defendant was doubtless entitled to a *voir dire* examination of Potalatin before proceeding with the cross-examination, but certainly not eight days later. There was no error in the denial of his untimely motion. Similarly,

we find no error in the trial judge's decision to permit Portalatin's identification to stand.

Ortiz-Cameron also alleges error in the admission of testimony concerning his disappearance from his normal whereabouts immediately after the "La Furnia" episode and concerning his health which the government asserted could only be explained by his participation in illicit drug deals over a period of time. The defendant had ample opportunity to rebut such testimony. It is well established that unexplained flight or a defendant's attempt to conceal his identity may be relevant evidence of guilt. *See, e.g., United States v. Grandmont*, 680 F.2d 867, 869 (1st Cir. 1982). Similarly, evidence

of the acquisition of otherwise unexplained wealth may corroborate other evidence of participation of lucrative crimes. *United States v. Ariza-Ibarra*, 605 F.2d 1216, 1224-25 (1st Cir. 1979), *cert. denied*, 454 U.S. 895 (1981).

3. Severance.

All three defendants moved before trial for a severance on the ground that there would be prejudicial "spill-over" of evidence from one to the other. Such a motion is addressed to the sound discretion of the trial judge. *United States v. Natanel*, 938 F.2d 302, 308 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 986 (1992); *United States v. Boylan*, 898 F.2d 230, 246 (1st Cir.), *cert. denied*, 111 S. Ct. 139 (1990). Where defendants are

indicted in a common conspiracy, there necessarily will be evidence relevant to the charges against more than one defendant, and properly so, since co-conspirators are liable for all of the criminal acts carried out in furtherance of the conspiracy. *United States v. Figueroa*, 976 F.2d 1446, 1452 (1st Cir. 1992). The district judge properly exercised his discretionary power in denying the motion and properly instructed the jury to consider the evidence against each defendant separately.

Defendants Ortiz Arrigoitia and Medina Vazquez renewed their motion after the defendant Ortiz-Cameron called Rafael Tormes, a convicted member of the same drug conspiracy, as a witness. On the

stand, Tormes testified that Ortiz-Cameron had nothing to do with the La Furnia unloading. He did not in any way incriminate Ortiz Arrigoitia or Medina Vazquez. No inconsistent defense was presented. All that occurred was that on cross-examination Tormes corroborated some of the details of Portalatin's testimony. The prejudice claimed by Ortiz Arrigoitia and Medina Vazquez is that by so doing Tormes bolstered the credibility of Portalatin to their detriment. The defendants have offered no authority in support of the dubious proposition that this entitles them to a mistrial, and we have found none. *See, United States v. Angiulo*, 897 F.2d 1169, 1194-95 (1st Cir. 1990) (finding withdrawal/noninvolvement

defense insufficiently antagonistic to require severance); *United States v. Luciano Pacheco*, 794 F.2d 7, 8-10 (1st Cir. 1986) (explaining that the degree of antagonisticism must go beyond mere finger pointing into the realm of fundamental disagreement over core and basic facts); *United States v. Talvera*, 668 F.2d 625, 630 (1st Cir.) (concluding that antagonistic defenses doe not per se require severance, even if the defendants are hostile or attempt to cast blame on each other), *cert. denied*, 456 U.S. 978 (1982). The district judge properly denied the defendants' motion for severance and a mistrial.

4. Improper Argument.

In the course of his closing

argument, the prosecutor said with reference to the defense attorneys, "they want like to scramble your heads, confuse you." After and objection was overruled, the prosecutor repeated "They wanted to confuse your head." Later the prosecutor said, "Do not let the attorneys here intimidate you, ladies and gentlemen --"[1] Defense counsel objected. The judge responded by addressing the jury: "I don't believe that the attorneys for the defendants are intimidating the jurors so --."

In this particular instance we are not persuaded that these comments were so

[1]This quotation and the following one were unfinished sentences according the transcript and are not ellipses created by the author of this opinion.

prejudicial as to require reversal. We do not understand, however, why, after numerous warnings from this court, the prosecuting attorneys in the District of Puerto Rico persist in spiking their argument with comments that put their cases at risk. *See, e.g., United States v. Soto-Alvarez,* 958 F.2d 473, 477-78 (1st Cir. 1992); *United States v. de Leon Davis,* 914 F.2d 340, 344-45 (1st Cir. 1990).

5. Sentencing errors.

Medina Vazquez argues that the district judge erroneously refused to reduce his offense level by four because of his minimal participation. U.S.S.G. §3B1.2. The comment (n.2) to the cited section suggests that this reduction

should be used sparingly, e.g., in a case where the defendant was engaged in a single off-loading. In this case there was credible evidence that Medina Vazquez had been involved in a number of off-loadings. In the absence of any transcript of the sentencing hearings in either the record or the supplementary record, we shall assume that the district judge made appropriate findings of fact. *See, e.g., Valedon Martinez v. Hospital Presbiteriano*, 806 F.2d 1128, 1135 (1st Cir. 1986) ("We have held repeatedly that we will not review a claim of error if the appellant has failed to include a transcript of the pertinent proceedings in the record on appeal.")

Ortiz-Cameron argues that the

district judge failed to make sufficiently detailed findings of fact in resolving factual disputes raised by objections to the presentence investigation report ("psi"). In fact, those objections to the psi present in our record on appeal raised no substantial factual issues, except that of guilt, which had already been resolved by the jury. The district judge's findings were more than adequate under the circumstances.

6. Ineffective assistance of counsel.

Ortiz-Cameron alleges ineffective assistance of trial counsel. We have repeatedly held that, absent exceptional circumstances, this claim is not open on direct appeal unless it has been previously raised before the district

judge, who is in the best position to make an initial judgment. *See, e.g., United States v. Gray*, 958 F.2d 9, 15 (1st Cir. 1992). This issue was not presented to the district judge, who in fact praised trial counsel for his diligence at one point in the trial.

7. Recusal.

After the trial in this case the trial judge recused himself from the trial of Sonia Berrios Rodriguez, "La Nena," the purported head of the drug ring, on the grounds of his familiarity with the facts of the case because of previous related trials, of which this was one. Ortiz-Cameron claims that this shows that the judge was prejudiced and should have recused himself earlier. In fact the

judge was under no obligation to recuse himself from the trial of "La Nena," but did so as a matter of discretion. *In re Allied-Signal Inc.*, 891 F.2d 967, 970 (1st Cir. 1989). Defendant's argument is frivolous.

8. Motion for Mistrial Resulting from Jury Misconduct.

The major controversy in this case swirls around events stemming from allegations of juror misconduct. There are two issues that arise in this context. First, we must decide whether the district court's finding regarding juror impartiality was clearly erroneous. Second, we must decide whether a remark made by the district court while investigating the question of juror impartiality improperly shifted the burden

of proof. While these two questions are factually intertwined in this case, they are analytically distinct, and we therefore consider them *seriatim*.

A. Background

At the close of the government's case, the judge was advised that the daughter of a juror, who had been daily accompanying the mother to the court, had been observed in prolonged conversation with a young woman identified as the girl friend of the defendant Ortiz-Cameron. The district judge then interviewed the daughter and her mother, the juror. It appeared from these interviews that the juror had discussed the case at length with her daughter, and had expressed very definite views about the testimony of the

government's witnesses. The daughter also reported her understanding from talking with her mother that the jurors had discussed the case among themselves. The juror was then segregated from the other jurors and later excused.

The judge then summoned all of the jurors into chambers, one by one, and asked them the following series of questions:

> 1. At this point, have you discussed with the jurors or anyone else the guilt or innocence of the defendants?
>
> 2. Have you discussed with the other jurors or with anyone the reputation of the defendants?
>
> 3. Have you discussed with the other jurors or with anyone else the credibility of any of the witnesses?
>
> 4. At this point, have you reached a decision regarding the

> guilt or innocence of the defendants?

All of the jurors except one answered the first three questions in the negative. One juror said that he thought he had heard some comment about the case but could not remember what it was about. Four jurors, however, answered the fourth question in the affirmative, indicating that they had reached a decision concerning the guilt or innocence of the defendants. The judge then recalled these four jurors, again one at a time, and addressed each one as follows:

> As I instructed you before, the guilt or innocence of the defendants is decided after listening to all the evidence, to the final summations of the attorneys and after applying the instructions as to the law to be given by me.

> And my question is, would you be able to keep an open mind and in the course of your deliberations with your fellow jurors, re-examine your own views and change your opinion if convinced it is erroneous?

All four of the jurors answered emphatically in the affirmative. The district judge then declared that he was satisfied that the jurors would carry out their duty properly, based on their answers and his observation of their demeanor.

Counsel for Ortiz-Cameron and counsel for Medina Vazquez (and counsel for another defendant whose appeal is not before us) moved for a mistrial. Counsel for Ortiz Arrigoitia expressly declined to so move at that time and joined in the motion only at the very end of the case,

just before closing arguments. In response to the judge's comment, counsel for Ortiz Arrigoitia admitted that he had initially refrained from joining the motion for the purpose of claiming double jeopardy if the motion had been granted without his consent. It is our view that a motion for a mistrial should be made promptly. This was no case of mistake or inadvertence, but one of deliberate delay for tactical purposes. Failure to make a timely motion for mistrial under these circumstances constitutes a waiver and precludes consideration of this issue on appeal with respect to Ortiz Arrigoitia. *Cf. United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991) (inferring waiver of a defendant's constitutional protection

against double jeopardy from silence where the defendant had the opportunity to object but failed to do so until one day later); *Grimaldi v. United States,* 606 F.2d 332, 339 (1st Cir.) (explaining that where defendant had the opportunity to renew a motion for mistrial for prosecutorial misconduct, but declined to do so, the claim was not preserved for appeal), *cert. denied,* 444 U.S. 971 (1979); *Saville v. United States*, 400 F.2d 397, 400 (1st Cir. 1968) (concluding that motion for mistrial was untimely where defendant failed to act at the earliest possible opportunity), *cert. denied*, 395 U.S. 980 (1969).

B. District Court's Finding.

When a non-frivolous suggestion is

made that a jury may be biased or tainted by some incident, the district court must undertake an adequate inquiry to determine whether the alleged incident occurred and if so, whether it was prejudicial. *See, e.g., Boylan*, 898 F.2d at 258; *United States v. Anello*, 765 F.2d 253, 259 (1st Cir.), *cert. denied*, 474 U.S. 996 (1985); *United States v. Corbin*, 590 F.2d 398, 400 (1st Cir. 1979). The trial judge is not, however, shackled to a rigid and unyielding set rules and procedures that compel any particular form or scope of inquiry. Rather, in light of the infinite variety of situations in which juror misconduct might be discerned and the need to protect jurors and the jury process from undue imposition, the trial judge is

vested with the discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial. *Boylan*, 898 F.2d at 258. As we have often explained, "A district court has broad, though not unlimited, discretion to determine the extent and nature of its inquiry into allegations of juror bias." *Corbin*, 590 F.2d at 400.

In this case, upon discovering that a juror may have spoken about the trial to her eighteen year-old daughter, the district court immediately summoned the juror and the daughter to chambers for separate interviews in the presence of all counsel. The juror confirmed that she had spoken to her daughter about the

defendants, but denied that she had talked to the other jurors about the case. The district court promptly segregated the juror and announced his intention to interview individually all jurors to determine if any others had been tainted. The following morning all jurors denied speaking about the case to outsiders or each other, though one thought he had heard some comment among the jurors about the case without identifying what those comments concerned. Counsel were present but were not permitted to participate directly in the interviews; however, the questions posed by the judge to the jurors reflected concerns previously expressed by counsel. Counsel has no right to pose specific questions to a juror or to pursue

every desired avenue of inquiry. The control and direction of a court's investigation into juror misconduct is within the discretion of the district court, not defense counsel. *Corbin*, 590 F.2d at 400.

After interviewing all the jurors and relevant third parties, consulting with counsel, and weighing the testimony, demeanor, and credibility of the various parties, the court found the jurors were not partial. The trial court conducted and adequate investigation into the alleged misconduct and reached a reasonable conclusion about the jurors' impartiality. Ortiz-Cameron and Medina Vazquez present no compelling evidence to the contrary and we find nothing in the

record that leads us to believe that the district court's investigation was inadequate or his findings clearly erroneous.[2]

C. Remark By Judge.

It is also suggested that the district court shifted the burden of proof when it asked the four jurors: "would you

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[2]Our dissenting colleague suggests an "alternative ground for reversal" -- the district court's failure to inquire into Juror Carrero-Roman's statement that members of the jury had discussed the case. See *Stahl,* n.4 The defendants, however, have not specifically argued this issue on appeal. In any event, we do not consider the alternative ground to be meritorious. Juror Carrero-Roman's answer was extremely indefinite and, on the facts of this case, did not require a full-fledged judicial inquiry. Moreover, the judge essentially conducted a full-fledged inquiry when he asked the other jurors questions which would have revealed precisely the impropriety which Judge Stahl fears.

be able to keep an open mind and in the course of your deliberations with your fellow jurors, re-examined your own views and change your opinion if convinced it is erroneous?" Although recognizing that the judge's remark is less than a textbook model, we do not view the language employed, in the specific context of this case, as suggesting that the defendants bore the burden of providing their innocence.

First, the judge's remark was not an instruction at all but a question asked mid-trial in the context of an investigation we have otherwise held to be sufficient. *See supra* Part A. Second, the question -- even if somehow deemed to be an instruction -- did not place the

burden of proof on any specific party but merely asked whether the jurors retained the ability to re-examine their views in light of further developments. Indeed, the judge scrupulously avoided indicating what particular views he thought the jurors possessed and instead referred only the jurors' ability to change their "opinion," whatever it might be. Third, again assuming that the question were to be deemed an instruction, the defendants did not give the district court an opportunity to cure it by, at any stage, proposing a sound alternative instruction.

And, finally, assuming the question were an instruction, it must be viewed in the context of the entire jury charge. *See Boylam,* 898 F.2d at 224; *see also Cupp*

v. Naughten, 414 U.S. 141, 146-47 (1073) ("a single instruction to a jury may not be judged in artificial isolation"). Here, in his pre-deliberations charge, the judge at least ten times explicitly and directly instructed the jury that the government bore the burden of proof.[3]

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[3]To provide just two examples, the judge stated:

> Indeed the defendants are presumed by law to be innocent. The law doe not require the defendant to prove his innocence or produce any evidence al all and no inference whatsoever may be drawn from the election of a defendant not to testify.
>
> The government, that is the prosecution[,] has the burden of providing or proving the [defendants] guilty beyond a reasonable doubt and if he fails to do so, you must acquit them.

Later, the judge repeated that "it is up to the government to prove the

Moreover, the judge himself placed his previous questioning of the jury in context when he stated:

> Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

Any slight ambiguity created by the mid-trial reference to an "open mind," then, is adequately dispelled once the "instruction" is viewed in the context of these other, ample instructions.[4]

[defendants] guilty beyond a reasonable doubt." Elsewhere in the charge the judge continually instructed the jury that the government bore the burden of proof beyond a reasonable doubt with regard to each element of each offense.

[4]We note, however, that this entire situation could easily have been avoided had the judge instructed the jurors, at the time this issue arose, that the burden of proving the defendants' guilt always rests with the government.

We find further support for our conclusion in a fifth factor -- circuit precedent. *See United States v. Nickens*, 955 F.2d 112, 118-19 (1st Cir. 1992). *In Nickens* the district judge, in his opening charge to the jury and in remarks made to the jury after closing arguments, actually issued an "open mind" instruction very similar to the mid-trial question asked here. In finding that the instruction was not plain error, we held that it "merely told the jury not to evaluate the evidence it would be hearing until the evidence was all in and the court had rendered its instructions." *Id.* at 118. We further noted that:

> Telling a jury to postpone making a final judgment until all the evidence has been presented, does not instruct the jury as to the weight or effect that should be given to any aspect of that evidence -- nor to the presumption of innocence -- when making their final judgment.

Id. at 119. Given this precedent, and give the four case specific factors we have identified, we find that the remarks made by the district judge did not impermissible shift the burden of proof.[5]

STAHL, Circuit Judge, (Dissenting). With respect, I dissent from the majority opinion because I believe that the

[5]The judge below also made a mid-trial "open mind" statement which is more easily construed as an "instruction." As the dissent acknowledges, however, no one challenged this statement at any stage. If we were to review it, then, it would be under a plain error rubric and *Nickens* would directly control.

district court's response to the juror misconduct allegations in this case obliges us to grant defendants a new trial. With regard to this issue, the majority rests its affirmance on the well established ruled that district courts have discretion "to fashion an appropriate and responsible procedure to determine whether [juror] misconduct actually occurred and whether it was prejudicial." *Ante*, at 15 (*citing Boylan*, 898 F.2d at 258). While I agree that a district court has a broad discretion to determine the nature of its inquiry into allegations of juror misconduct, I do not think that that discretion is so broad as to permit a court to commit errors of constitutional dimension while performing that inquiry.

Here, the district court, in its effort to assess whether juror misconduct had occurred, selected a method of inquiry which had the effect, in my opinion, of shifting the burden of proof from the government to the defendants. Moreover, the court's failure properly to instruct the jurors of the government's burden of proof compounded the error. As a result, I am of the opinion that the motions for mistrial should have been granted. For these reasons, I would reverse.

This case, in my view, cannot properly be resolved without a detailed summary of the events surrounding the court's response to the juror misconduct allegations. I begin therefore with a recitation of these facts.

When the question of possible juror misconduct arose, the district judge immediately and correctly commenced an interrogation of a young woman, the daughter of Juror Gonzalez, who had been seen conversing with a defendant's girlfriend. During the inquiry, it became apparent to the court that the daughter and the defendant's girlfriend had discussed that defendant's innocence. It also became clear that the daughter had discussed many aspects of the case with her mother, Juror Gonzalez. As a result, the court then interrogated Ms. Gonzalez.

Juror Gonzalez admitted that she had engaged in discussions with her daughter about the case. She denied, however, having expressed any opinion as to the

guilt or innocence of the defendants, and generally downplayed the extent and content of the discussions. She also stated that no juror had indicated an opinion as to the guilt or innocence of the defendants.

At the conclusion of Juror Gonzalez's interrogation, counsel for defendant Diaz Fernandez and counsel for defendant Ortiz-Cameron moved for mistrial. In response, the court first indicated that it did not intend to question any of the other jurors. The AUSA requested, however, that the court reconsider that decision. The court then indicated that it would take no action on the mistrial that evening but would decide what to do the following morning. Ortiz-Cameron's attorney then,

for unexplained reasons, retracted his motion for mistrial.

The following morning, the court commenced interrogations of each of the remaining twelve jurors, beginning with the jury foreman. Counsel took no part in the formulation of the following questions:

> (1) At this point have you discussed with the other jurors or with anyone else the guilt or innocence of the defendants? (2) Have you discussed with the other jurors or with anyone the reputation of the defendants? (3) Have your discussed with the other jurors or with anyone else the credibility of the defendants? **(4) At this point have you reached a decision regarding the guilt or innocence of the defendants?**

The foreman and eight of the jurors answered "no" to all four questions. One of those jurors, Mr. Luis Carrero Roman,

however, answered question three with the statement: "Well, I can say it is hard for me to say yes or not because yes, we made comments between us but nothing that I can say yes or no." Four other jurors (hereinafter referred to collectively as "the four jurors") while answering "no" to the first three questions, answered "yes" to the critical fourth question.

At this juncture, the Court individually recalled the four jurors. The court then asked the four jurors one question which, in my opinion, was seriously leading. Before asking the question, the court made the following statement:

> As I instructed you before, the guilt or innocence of the defendants is decided after listening to all the evidence,

> to the final summations of the attorneys and after applying the instructions as to the law to be given by me.

The court followed this statement with:

> And my question is, would you be able to keep an open mind and in the course of your deliberations with your fellow jurors, re-examine your own views and change your opinion if convinced it is erroneous?

Each of the four jurors answered this question in the affirmative. Juror Luis Carrero Roman, who admitted to having engaged in discussions with other jurors, was not recalled. At no time did the court allow counsel to speak or to propose follow-up questions. Indeed, throughout the inquiry, the court refused to allow defense counsel to utter so much as a word.

After the inquiry ended, however, the court entertained objections. Counsel for Diaz Fernandez objected both to the length of the court's interrogations and the leading nature of the revised question. He also pointed out that some jurors had stated that they either had discussions with one another or had already made up their minds. Counsel then renewed his motion for a mistrial, stressing his belief that no instruction could cure the problem. Counsel for defendant Ortiz-Cameron then joined the motion for mistrial, arguing that the presumption of innocence had been compromised. Counsel for the defendant Ortiz Arrigoitia, while objecting to the court's juror questions, nonetheless did not join the motion for

mistrial.

At that point, the AUSA also expressed concern with the court's inquiry:

> [O]ne thing concerns me, and it is a point brought up by [defense counsel] concerning the instructions that have been given by the Court to the petit jury to the effect that they should keep an open mind at all times until the end. And apparently these four jurors, at least, have not kept an open mind until the end of the proceedings.

As a result of these concerns, the AUSA urged the court to enter specific findings as to the "demeanor" of the four jurors:

> . . . I would ask that the court make[] findings to the effect that [the four jurors] appear[ed] to be quite sincere... The bottom line is, Your Honor, this is a due process issue, whether these defendants are being afforded due process by these jurors, and

> to the effect, I believe the Court would have to enter a finding that yes, they can, they are willing and able to keep an open mind and to reach a decision at the end of the case based upon the evidence and the instructions given by the court. I would think it is a close shot, but I think there is sufficient information received by the Court through the questioning to make a decision.

Immediately thereafter, the court entered the following statement for the record:

> All right. This is a matter of deciding whether these jurors, especially the four jurors that we have questioned, are sincere and will be willing to give these defendants all due process. And I believe[,] and I so find[,] that these jurors are sincere and in the same way they expressed an opinion that they have reached a decision as of now, they also sincerely are able to keep an open mind and re-examined their own views ... I was impressed by the sincerity of the answers and the

> expressions in the face of each juror when I asked the second part of the last question ...

The court then denied the pending motions for mistrial. Subsequently, counsel for defendant Pedro Rivera joined the motions for mistrial.

The court then decided to excuse Juror Gonzalez, whose discussions with her daughter had inspired the entire inquiry, a decision approved by all counsel. When the jury reconvened, the court instructed it as follows:

> So, I again repeat my instructions to you, not to form or express an opinion regarding the guilt or innocence of the defendant, to keep an open mind. Don't discuss the case among yourselves or with anyone else. Keep an open mind.

No one objected to this instruction.

The Court's final instructions to the

jury contained the following:

> The indictment or formal charge against the defendant is not evidence of guilt. Indeed the defendants are presumed by law to be innocent. The law does not require the defendant to prove his innocence or produce any evidence at all and no inference whatsoever may be drawn from the election of the defendant not to testify.
>
> Under the law a defendant may or may not testify as he elects since it is up to the government to prove them guilty beyond a reasonable doubt as I said before. The law does not require the defendant to take the witness stand and testify and no presumption of guilt may be raised and no inference of any kind may be drawn from defendant's failure to testify.

In addition, the court gave several other "reasonable doubt" instructions in connection with various aspects of the case. At no time, however, did it unequivocally instruct that the burden of

proof as always on the government.[6]

The majority concludes that the district court reached a reasonable conclusion about the impartiality of the

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[6]In its initial charge to the jury, the court instructed on the government's burden as follows:

> The indictment or formal charge against the defendant is not evidence of guilt. Indeed the defendants are presumed by law to be innocent. The law does not require the defendant to prove his innocence or produce any evidence at all and no inference whatsoever may be drawn from the election of a defendant not to testify.
>
> The government, that is the prosecution has the burden of providing or proving them guilty beyond a reasonable doubt and if he (sic) fails to do so, you must acquit them. Thus, while the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all doubt.

jurors and that defendants Ortiz-Cameron and Medina Vazquez:

> present no compelling evidence to the contrary and we find nothing in the record that leads us to believe that the district court's investigation was inadequate or his findings clearly erroneous.

Ante, at 16. Respectfully, my review of that same record leads me to the opposite conclusion.

When faced with four jurors who admitted that they had formed an opinion about the guilt or innocence of the defendants, the district court brought these four jurors into chambers again and, in my view, structured the "open mind" question in such a way that "yes" was the only acceptable response. Before asking the question, the court effectively

admonished the four jurors, reminding them of its instruction at the beginning of the trial to determine guilt or innocence only after hearing all of the evidence. One does not need a degree in psychology to understand the effect that this statement had on the four jurors' ability to answer this critical "question" in a calm and uninhibited manner.

At pages 17-19 of the majority opinion, my brethren offer five reasons why this question did not, in their estimation, shift the burden of proof. I do not think that any one of these five points sufficiently answers the problem. With the first four points, I am afraid that my colleagues have ceded analysis to semantics, and have exalted form over

substance. I cannot join in such an approach, particularly where, as here, the fundamental right to a fair trial is at stake.

As to the majority's fifth point - i.e., its reliance upon *Nickens*, 955 F.2d at 118-19, for the proposition that the judge's "open mind" instruction cured any such shifting of the burden of proof - I am baffled. In Nickens, we upheld almost identical "open mind" instructions only after acknowledging that they were problematic. *See id.* at 118 (affirming instructions "[w]ithout endorsing their form"). We were analyzing those instructions to determine whether they alone had the effect of negating the presumption of innocence. We reasoned that

those instructions "would [not] normally suggest to the jury that the government's burden of proving guilt is equal to defendant's burden of proving innocence." *Id.* (emphasis supplied). Finding nothing extraordinary in that case, we concluded that the instructions were not "so egregious as to constitute plain error." *Id.*

Here, however, we are not reviewing this "open mind" instruction to determine whether it alone had the effect of negating the presumption of innocence. Rather, we must determine whether this otherwise problematic instruction cured the multi-layered burden of proof problems presented by this case. I think it obvious that this instruction cannot and

should not be viewed as curative.[7] As such, my colleagues' reference to *Nickens* as controlling "circuit precedent" is entirely unpersuasive.

In sum, it is my strong opinion that when he reconvened the jury, the trial judge had an obligation to cure any potential misperceptions his colloquy may have left in the minds of the four jurors on the fundamental question of who bears the burden of proof. Waiting until the very end of a lengthy trial to instruct the jury properly on this question does

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[7]Moreover, I do not think that the court's error should escape review merely because it entered into the record specific findings about the "demeanor" and visible "sincerity" of each of the juror's answers to the question.

not alleviate the prejudice.[8] Under **any** standard of review, I think these convictions should be reversed and that defendants should be granted a new and fair trial.[9]Any other result denies these

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[8]To bolster its affirmance, the majority refers to the numerous occasions on which the district court, before the juror misconduct allegations surfaced, instructed the jury on the burden of proof. Those instructions are, however, utterly irrelevant in determining whether the district court, later in the trial, made statements or gave instructions that may have negated the presumption of innocence.

[9]I further note that the majority opinion does not adequately address the district court's failure to inquire into Juror Luis Carrero Roman's admission that members of the jury had, in fact, conversed about the case As we made clear in *United States v. Richman*, 600 F.2d 286, 295 (1st Cir. 1979), a trial court should conduct the following four-part inquiry when faced with allegations that jurors may have acted improperly:

> [1] ascertain whether the misconduct actually occurred; [2] if it did, determine whether it was prejudicial; [3] if not clearly unprejudicial, grant a new trial; [and] [4] specify reasons if the court determines either that the misconduct did not take place or was not clearly prejudicial.

Id. (citing United States v. Doe, 513 F.2d 709, 711-12 (1st Cir. 1975). Here, after learning from Juror Carrero that members of the jury had discussed the case, the district court failed to inquire further and refused to allow defense counsel to interject follow-up questions. As a result, the record contains no evidence about what types of discussions Juror Carrero may have had with other jurors, or may have overheard. We are left to speculate. In light of all the circumstances, I consider this error an alternative grounds for reversal. Furthermore, I cannot agree with the majority's cavalier conclusion that "the judge essentially conducted a full-fledged inquiry when he asked the other jurors questions which would have revealed precisely the impropriety which Judge Stahl fears." *Ante*, at n.2. First the record contains no such "full-fledged inquiry"; and, second, any inquiry of "the

defendants a "'basic protection'" afforded by the Constitution, a protection which reflects "'a profound judgment about the way in which law should be enforced and justice administered.'" *Sullivan v. Louisiana*, No. 92-5129, 1993 WL 179275, at *4 (U.S. June 1, 1993) (*quoting Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). I therefore dissent.

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other jurors" could not possibly have revealed anything about what Juror Carrero did or did not know about the putative juror misconduct. It appears, therefore, that the once strict requirements of *Richman* have been relaxed to such an extent that a district court now has discretion, according to the majority, to conduct essentially no inquiry al all.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1365

UNITED STATES,
Appellee,

v.

LUIS HIRAM ORTIZ-CAMERON,
Defendant, Appellant

Before

BREYER, Chief Judge,
TORRUELA, SELYA, CYR, BOUDIN and STAHL,
Circuit Judges,
SKINNER*, District Judge

Entered August 27, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en